IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1032 OF 1994
WITH
CRIMINAL APPEAL NO. 1096 OF 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VAGHAJI SARTANJI THAKOR - Appellant(s)

Versus

STATE OF GUJ - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Petitioner No(s).: 1.
MR AJ DESAI APP for Respondent No(s).: 1.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 14/06/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

1. Both these appeals are directed against judgment and order dated 30-9-1994 passed by the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 76 of 1994 convicting both the appellants for the offence punishable u/s 302 read with Section 34 of the I.P. C. and sentencing both the appellants to undergo life imprisonment with fine of Rs.1000/- (in default rigorous imprisonment for one month) and also convicting the appellants for the offence punishable u/s 323 read with Section 34 of the I.P. C. and sentencing the appellants to undergo imprisonment for one month with fine of Rs.100/- (in default rigorous imprisonment for 7 days).Both the sentences were ordered to run concurrently.

2. Vaghaji Sartanji appellant in Criminal Appeal No. 1032 of 1994 is the husband of Shardaben who is appellant in Criminal Appeal No. 1096 of 1994. Vaghaji Sartanji Thakor was the elder brother of deceased Dajiji Sartanji. The appellants were charged for causing death of Dajiji at mid-night between 25th and 26th of January, 1994 on account of a dispute over getting the land back from the deceased. Vaghaji and his wife Shardaben were charged for the offence of causing death of deceased Dajiji by causing injuries on the head and face of the deceased with an axe and a stick respectively. The appellants were also charged for the offence of causing hurt to Dilip - the son of the complainant and the deceased.

3. The prosecution case, in brief, was that Vaghaji Sartanji had borrowed monies from his deceased brother Dajiji when Shardaben had undergone surgery two years prior to the date of the incident and the amount was lent

by the deceased to Vaghaji Sartanji who mortgaged his share of the land to the deceased and appellant – Vaghaji was asking the deceased to return the land but the deceased refused to return the land without receiving money back from Vaghaji. On the mid-night between 25th and 26th of January, 1994, the deceased was sleeping in varandah of his house along with his son – Dilip and the complainant (Sajjanben wife of the deceased) with two other children was sleeping inside the house . On hearing the sound of blows, the complainant came out from the house and saw that both the appellants were assaulting the deceased with an axe and a stick. When the deceased shouted for help both the appellants ran away with the weapons in their hands. The complainant went to the place of offence and found that the deceased was lying in a pool of blood and their son was also injured by the appellants and thereafter the first information report was lodged with the police in the morning.

4. When the trial commenced before the learned Addl. Sessions Judge, the appellants pleaded not guilty for the charge framed against them. The prosecution examined complainant P.W. 1 – Sajjanben Exh.17 the only eye witness and other witnesses - P.W. 2 Savdhanji Viraji Exh.19 - (son of paternal uncle of Vaghaji), P.W. 3 Punjaji Bhejiji Exh. 20 as both of them had rushed to the scene of offence when complainant Sajjanben shouted for help at the time of incident. The prosecution has also examined panch witnesses to prove panchnama of scene of offence and panchnama of recovery of the stick and the axe. The prosecution has also examined P.W. 7 - Dr. Nimesh Ramanlal Shah Exh. 32 who had conducted post-mortem examination of the dead body of deceased Dajiji

and also P.W. 8 - Dr. Manilal Amathabhai Prajapati Exh. 34 who had treated minor Dilip who was injured during the incident.

5. After the prosecution witnesses were examined, further statement of each of the appellants was recorded u/s 313 of the Criminal Procedure Code and the appellants raised defence of denial. Both the appellants also stated in the said further statements that the land in question was standing in the name of the father of Vaghaji and deceased Dajiji and it was not partitioned and that the accused had not taken any money from the deceased and that the complainant's witness Ranchhodji Romaji and Ramji Viraji had filed false complaint against them.

6. After considering the entire evidence, the learned Addl. Sessions Judge believed the prosecution case and held that the prosecution has proved beyond reasonable doubt that both the appellants had gone to the house of the deceased with the intention of causing death of the deceased and inflicted injuries on the head of the deceased which were sufficient in the ordinary course of nature to cause death of the deceased. It was also held that the appellants caused injuries to son – Dilip.

The learned Addl. Sessions Judge recorded the conviction against both the appellants for the offence punishable u/s 302 read with Section 34 of the I.P. Code and for the offence punishable u/s 323 read with Section 34 of the I.P. Code. It is against the aforesaid judgment and order that the present appeals are filed by the accused.

7. Ms. Sadhana Sagar, learned advocate for the appellants has raised the following contentions :

(i) There was delay of 8-00 hours in lodging the F.I.R. after the alleged incident and therefore the same cannot be relied upon.

(ii) There are material discrepancies between the F.I.R and the deposition of the complainant who claims to be an eye witness.

(iii) Discovery panchanama for the muddamal stick is not proved.

(iv) No blood stain marks were found on the stick.

(v) Injuries which are said to be sufficient in the ordinary course of nature which resulted into the death were attributed to the axe and not to the stick allegedly used by appellant Shardaben.

8. On the other hand, Mr. A.J. Desai, learned A.P.P. has supported the judgment and order of the learned Addl. Sessions Judge and has submitted that both the husband and the wife went to the house of the deceased and assaulted him at the midnight of 25th and 26th of January, 1994 only with the intention to cause death for which the motive was very much there as they wanted to get the land back without paying money which Vaghaji had borrowed from the deceased.

9. We have heard the learned advocate for the appellants and learned Addl. P.P. For the prosecution and have given

our anxious thoughtful consideration to the submissions urged before us.

10. Before dealing with the rival submissions, it is necessary to refer to the external injuries found on the body of the deceased in the medical evidence being Post Mortem Note Exh. 33. The injuries were as under :

i. An oblique incise wound 4 cm. X 1 cm. X bone deep on the left side of forehead 1 cm. lateral to upper line and tamporal above.

ii. An oblique incise wound 4 cm. X 1 ½ cm. X bone deep with fracture of left frontal bone 1 cm. lateral to injury No.1 tamperial above.

iii. An oblique incise wound 2 cm x ½ cm x scull deep on mid-frontal region. (Injury Nos. 1 and 2 are vertically oblique and No.4 transversely oblique.)

iv. Huge swelling on left frontal – temporo zygomatic region.

v. Contusion of both eyelids on left eye.

As per the opinion of the Medical Officer P.W.7 – Dr. Nimesh Exh. 32, injury Nos. 1 to 3 could be caused by a sharp axe and the injury Nos. 4 and 5 could be caused by the handle part of the axe or by a stick and injury No.4 could also be caused by blood in hanskodi region being pooled at their place.

11. As far as the contention about alleged delay in filing the F.I.R. is concerned, we are not in a position to accept the said plea urged on behalf of the appellants. The incident in question took place at village Shankerpura, Taluka Mehsana at midnight of 25th and 26th of January, 1994. Dajiji – husband of the complainant had met almost instantaneous death as a result of the blows inflicted by the axe. According to the evidence of P.W. 1 Sajjanben Exh. 17 she fell unconscious after the incident. This evidence is not challenged by the appellants in the cross-examination. P.W. 9. Kaluji Exh. 36 gave first information on telephone from a dairy at Shankerpura to Langhanaj Police Station in the morning. Shankerpura appears to be a remote village not having a police chawky or public telephone facility. The incident took place at mid-night . The complainant had three minor children aged between 6 years and 2 months. It cannot be expected that a wife with minor children who has witnessed gruesome murder of her husband at midnight would be in a fit state of mind to file complaint immediately after regaining consciousness. It is quite known that villagers are reluctant to go to police more particularly when the victim is a lady and the offenders are family members of her in-laws. Under the circumstances, the F.I.R. lodged with the police at 8-25 a.m. in the morning cannot be said to be delayed F.I.R. so as to throw any doubt about the version of the complainant that both the appellants herein had gone to the house of the deceased and that the complainant had seen both the appellants running away from the place of the offence.

12. As regards, discrepancy between the F.I.R. and the deposition of the complainant, in so far as the complainant is concerned, she has stated in the F.I.R. that she had seen Vaghaji with the axe and Shardaben with the stick, was not the version which she adopted in her oral deposition at the trial where the complainant has stated that both Vaghaji and Shardaben had gone to the house of the deceased and the complainant with the axes in their hands. It is true as suggested by Mr. A.J. Desai, learned A.P.P. that the said contradictions were not proved in her cross-examination. However even from the medical evidence it is found that the deceased had sustained three incise wounds. According to P.W. 7 Dr. Nimesh Exh. 32 these serious injuries could have been caused by the axe and other two injuries could have been caused by a stick or the handle of the axe. Dilip – the son of the deceased had also sustained swelling injury below right knee. It is therefore not possible to accept the version of the complainant at the trial that both Vaghaji and Shardaben were carrying axes in their hands. The evidence of the complainant that Shardaben was carrying an axe in her hand appears to be an improvement over her original version.

Coming to the question of recovery of a stick, apart from the fact that the panchanama is not proved as the panch witness turned hostile; even assuming that recovery panchanama could be referred to on the strength of the evidence of the Investigating Officer, the fact remains that even as per F.S.L. Report Exh.41, when the stick which was recovered and marked as muddamal article No.11 was sent for analysis, it did not show that the blood stained marks were found on the stick. If Shardaben had

inflicted any stick blow on head of the deceased, the stick would have contained some blood stained marks on its surface. In view of the report of F.S.L. that no blood stained marks were found on the stick and that the blood stained marks were on the axe recovered from Vaghaji, it will have to be held that Shardaben had not inflicted any blows on the deceased.

13. As regards the role played by appellant Vaghaji, complainant P.W. 1 – Sajjanben Exh. 17 who is the sole eye witness has narrated the incident in detail and this evidence is supported by panchnama Exh.28 with regard to discovery of weapon axe. The P.M. note Exh.33 read with evidence of P.W. 7 Dr. Nimesh Exh.32 proves that death of Dajiji was homicidal in nature. The F.S.L. report Exh.41 indicates that muddamal axe had blood stained marks. In view of the above evidence, the trial Court has rightly held that appellant Vaghaji inflicted injuries on the head of Dajiji with an axe which resulted into his death but it cannot be accepted that appellant Shardaben gave stick blow on head /face which resulted into his death.

14. Both the appellants are also convicted for the offence punishable u/s 323 of I.P. Code. The prosecution has proved this charge through evidence of P.W. 1 Sajjanben Exh. 17, P.W. 7 - Dr. Nimesh Exh. 32, P.M. Report Exh. 33, P.W. 8 Dr. Manilal Exh.34 and medical certificate Exh. 35 against appellant Shardaben but there is no evidence against appellant Vaghaji. Therefore, appellant Vaghaji cannot be convicted for the offence punishable u/s 323 of I.P. Code.

15. Now the next question is whether it is possible to invoke the provision of Section 34 of the I.P. Code. Mr. Desai has vehemently submitted that when the appellants had gone to the house of the deceased at the midnight of 25th and 26th of January, 1994 Vaghaji was found carrying an axe. Even if Sharadaben was not carrying a stick in her hand, both the appellants had the common intention of causing death of the deceased and therefore the learned Addl. Sessions Judge has rightly convicted both the appellants by relying upon Section 34 of the I.P. C. While in view of the evidence on record, the learned advocate for the appellants is not able to make any dent on the findings recorded by the learned Addl. Sessions Judge against Vaghaji and we find no reason for the complainant to falsely involve Vaghaji in the incident, we do find that while the presence of Shardaben at the scene of offence has to be believed and the fact that Shardaben had accompanied Vaghaji to the scene of offence also cannot be disputed, it is not possible in the facts and circumstances of the case to hold that the appellant Shardaben had gone to the house of the deceased with the intention of causing death of the deceased or to inflict injuries which would in the ordinary course of nature result into death of the deceased. It cannot be overlooked that Shardaben being wife of Vaghaji would accompany Vaghaji when he was going to the house of his younger brother to demand his land back which he had given to the deceased while borrowing monies a couple of years back. Merely because Vaghaji was carrying the axe in his hand, it cannot be necessarily inferred that Shardaben had accompanied Vaghaji in order to assist Vaghaji for using the axe for the purpose of causing death of the deceased. It is equally possible that

Shardaben who was accompanying her husband Vaghaji would contend that there was a dispute between the brothers about the land and monies earlier borrowed by Vaghaji from the deceased and therefore the dispute between the brothers may not culminate into a serious untoward incident. In the above back ground, Shardaben accompanying her husband Vaghaji to the house of the deceased on the mid-night of 25th and 26th of January, 1994 cannot be said to be a circumstance which would be consistent only with the guilt of Shardaben for the offence of murder of Dajiji . In any case, at least, it cannot be said that Shardaben had accompanied her husband only for the purpose of causing death of the deceased. In the said set of circumstances, we are inclined to give benefit of doubt to Shardaben in so far as offence of murder punishable u/s 302 read with Section 34 of the I.P. Code.

16. As held earlier, Shardaben had accompanied her husband Vaghaji to the scene of offence and assaulted the deceased as well as his minor child Dilip who was injured as per the medical evidence of P.W. 18 Dr. Manilal Amathabhai Prajapati Exh.34 who found that there was swelling injury on the right elbow of minor Dilip. As per the medical evidence of P.W. 7 Nimesh Exh. 32 the injuries No.4 and 5 found on the body of Dajiji were possible by the handle of the axe or a stick. It appears that these injuries and injury caused to Dilip were simple injuries. Considering the nature of the injuries and the type of weapon (stick) used by appellant Shardaben, she was guilty of the offence punishable u/s 323 of the I.P. Code.

17. In view of the above discussion, while we confirm the conviction of Vaghaji appellant of Criminal Appeal No. 1032 of 1994 and also the order of sentence sentencing Vaghaji for life imprisonment, we set aside the order of conviction of Vaghaji for the offence punishable u/s 323 read with Section 34 of the I.P. Code. We also set aside the conviction of Shardaben appellant of Criminal Appeal No. 1096 of 1994 for the offence punishable u/s 302 read with Section 34 of the I.P. C. But at the same time, we confirm the conviction of Shardaben for the offence punishable u/s 323 of the I.P. Code and sentencing her to undergo rigorous imprisonment of one month. Since Shardaben has already undergone sentence by way of her detention during the trial and also during the period of pendency of appeal, and as she is released on bail pending the appeal, bail bond executed by Shardaben be discharged.

18. Accordingly, Criminal Appeal No. 1032 of 1994 and Criminal Appeal No. 1096 of 1994 are partly allowed to the extent indicated above.

(M.S. Shah, J.) (Bankim N. Mehta, J.)

/JVSatwara/